(2)

No. 09-1569

IN THE

Supreme Court of the United States

SYLVIA BAPTE, Individually and as personal representative of the Estate of Christiane Bapte, deceased, STEPHANIE ISABELLE BAPTE, MARYVONNE BAPTE, et al.,

Petitioners,

—v.—

WEST CARIBBEAN AIRWAYS, a Colombian corporation, NEWVAC CORPORATION, a Florida corporation, GO 2 GALAXY, INC., a Florida corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether the decision of the Court of Appeals below, finding that the District Court did not abuse its discretion in denying a Fed. R. Civ. P. 60(b) motion requesting that the District Court vacate an Order issued almost 2 years prior dismissing the case on the grounds of *forum non conveniens*, conflicts with the decision of this Court in *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965) and the decision of the Court of Appeals for the Tenth Circuit in *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975), each of which allowed relief from a merit-based dismissal of the action but only because (1) other victims of the same accident were permitted to recover by a different court interpreting the same law, and (2) the dismissal was deemed improper and inequitable due to an intervening change in the law (*Pierce*) or based on a later proper interpretation of the law (*Gondeck*).

PARTIES TO THE PROCEEDINGS

Plaintiffs in the Courts Below

A list of the plaintiffs is set forth in a separate letter dated June 23, 2010 filed by the Petitioners with the Court.

Defendants in the Courts Below

Defendants in the District Court and Court of Appeals below were as follows:

1. West Caribbean Airways, S.A., a Colombian air carrier which operated the chartered aircraft involved in this litigation.
2. Newvac Corporation, a small tour operator located in Florida.
3. Go 2 Galaxy, Inc., a small travel agency located in Florida.
4. Jacques Cimetier, a private individual who is the President of Newvac Corporation and Go 2 Galaxy, Inc.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUP. CT. RULE 29.6

Respondent West Caribbean Airways, S.A. is a Colombian air carrier organized and existing under the laws of Colombia, and currently is in bankruptcy. There is no parent corporation or publicly held corporation owning 10% or more of the stock of West Caribbean Airways, S.A.

Respondents Newvac Corporation and Go 2 Galaxy, Inc. are corporations organized and existing under the laws of Florida with their principal place of business in Florida. There is no parent corporation or publicly held corporation owning 10% or more of the stock of Newvac Corporation or Go 2 Galaxy, Inc.

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STATUTORY PROVISIONS INVOLVED

The relevant parts of Fed. R. Civ. P. 60 and 28 U.S.C. § 1407 are set forth in the Appendix ("Opp. App.") hereto at 36a-37a.

OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

Respondents Newvac Corporation and Go 2 Galaxy, Inc. (collectively "Newvac") and West Caribbean Airways, S.A. ("WCA") respectfully request that the Court deny the Petition for Writ of *Certiorari* ("Petition") seeking review of the opinion of the Court of Appeals for the Eleventh Circuit in *Bapte v. West Caribbean Airways, S.A.*, 2010 WL 1141063 (11th Cir. Mar. 25, 2010), reproduced in the Appendix to the Petition ("Pet. App.") at 1a-4a, wherein the Court of Appeals affirmed, as amended, the Order of the District Court denying Petitioners' motion for relief pursuant to Fed. R. Civ. P. 60(b). *In Re West Caribbean Airways*, No. 06-22748 (S.D. Fla. Sept. 11, 2009) (Pet. App. at. 5a-11a).

STATEMENT OF THE CASE

This litigation arises from the August 16, 2005 crash in Venezuela of WCA Flight 708 while en route from Panama to Martinique. All of the 152 passengers and 8 crew members on board the aircraft perished in the accident. The passenger-decedents were residents of Martinique, a Department of France; none were citizens or residents of the U.S. The entire crew, employed by WCA, were residents of Colombia.

This accident spawned numerous lawsuits in Florida and Martinique filed by both representatives of the passengers and representatives of the crew members. Set forth below is the detailed procedural history of this litigation to provide an accurate picture of the many opportunities that Petitioners had to present all of their arguments. Refusing to accept the decisions of the Courts below finding that Martinique (the residence of the plaintiffs and passengers-decedents), not Florida, is the most convenient forum for the determination of their damages, Petitioners have invoked every procedural mechanism here and in Martinique to attack or subvert the District Court's *forum non conveniens* ("FNC") dismissal. As the District Court recently stated in the Order denying Petitioners' motion to intervene in the Crew Case:

> the Motion to Intervene is essentially an attack on this Court's previous *forum non conveniens* rulings. [footnote omitted] Nothing prevented the Bapte Plaintiffs from asserting product-liability claims against the U.S. Defendants in the Passenger Case, the existence of which would have been considered in the Passenger Case *forum non conveniens* analysis. And similarly, nothing prevented the Bapte Plaintiffs from moving to intervene prior to the extensive *forum non conveniens* litigation in this case. Instead, the Bapte Plaintiffs now argue that they are effectively entitled both to a do-over of their *forum non conveniens* litigation in the Passenger Case and to cir-

> cumvent the *forum non conveniens* litigation in the Crew Member Case by way of a late-in-the-game intervention. However, the Bapte Plaintiffs are not so entitled.
>
> * * *
>
> Finally, after years of litigation in both the Passenger and Crew Member Cases, the Bapte Plaintiffs' recent attempts at reversing the course of their litigation are highly irregular, when viewed from the ground-level and in the totality of the circumstances. While the Bapte Plaintiffs themselves sit, uncompensated for their losses despite the damage awards awaiting them in Martinique, counsel for the Bapte Plaintiffs seem intent on engaging in last-minute procedural maneuvering with no clear relation to their clients' interests.

In re West Caribbean Crew Members, No. 07-22015, Opp. App. at 26a-28a (S.D. Fla. Jan. 8, 2010), *appeal docketed*, No. 10-10501 (11th Cir. Feb. 4, 2010); *see also* Pet. App. at 6a, n.4 (same). Of particular significance is that the Crew Case has been settled and dismissed (Opp. App. at 30a-32a), and the claims of the representatives of many of the other deceased passengers are being swiftly resolved in Martinique (Opp. App. at 7a).

A. Relevant Facts

On March 25, 2005, Newvac entered into a charter contract with WCA in Colombia pursuant to which WCA was to provide a 152-passenger MD-82 aircraft and crew for round-trip flights

from Martinique to Panama during May-August 2005. After entering into the charter contract with WCA, Newvac contracted with Globe Trotter, a Martinique travel agency, whereby it agreed to provide the WCA aircraft to Globe Trotter for a series of excursions between Martinique and Panama. The vacation packages were then sold by Globe Trotter to individual passengers in Martinique. The accident occurred on August 16, 2005 when the WCA aircraft crashed in Venezuela during a return trip from Panama. This litigation followed.

B. The In re West Caribbean Passenger Case

Representatives of the 152 passengers-decedents involving over 665 Martinique beneficiaries filed three separate actions in the Southern District of Florida against WCA, Newvac, Go 2 Galaxy and Jacques Cimetier (the President of Newvac/Go 2 Galaxy).

The first two actions were filed in November 2006 by the Petitioners (*Bapte* Plaintiffs) and the *Galbert* Plaintiffs, and a third action was filed in 2007 by the *Cadare* Plaintiffs. These three actions (collectively "Passenger-Plaintiffs" or the "Passenger Case") were consolidated before the District Court below under *In Re West Caribbean Airways*, No. 06-22748 (S.D. Fla.). The Passenger-Plaintiffs in each action sought to recover damages for the deaths of the 152 passenger-decedents pursuant to the terms of the Montreal Convention,[1] which exclusively governs the rights and

[1] Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May

liabilities of passengers and carriers for passenger death occurring during the course of international carriage by air.

Eventually, only WCA and Newvac remained in the Passenger Case and they moved for FNC dismissal in favor of Martinique.

1. November 2007—FNC Dismissal of the Passenger Case

By Preliminary Order dated September 27, 2007, the District Court found that Newvac was a "contracting carrier" within the meaning of Article 39 of the Montreal Convention, and therefore, had treaty subject-matter jurisdiction pursuant to Article 33, but that it nevertheless could utilize the procedural mechanism of FNC in order to dismiss a lawsuit with little or no connection to the chosen forum. *In re West Caribbean Airways, S.A.*, 619 F. Supp. 2d 1299, 1305-28 (S.D. Fla. 2007).

In a second order dated November 9, 2007, the District Court addressed the merits of the FNC motion. *See In re West Caribbean Airways, S.A.*, No. 06-22748, Pet. App. at 36a-55a (S.D. Fla. Nov. 9, 2007) ("Passenger FNC Order"). Newvac and WCA agreed not to contest liability as a condition for FNC, and the parties agreed that with respect to the Montreal Convention claims Respondents' liability would not be at issue. Pet. App. at 46a. Thus, the principle focus of the FNC inquiry was damages.

1999, ICAO Doc. No. 9740 (entered into force Nov. 4, 2003), *reprinted in* S. Treaty Doc. 106-45, 1999 WL 33292734.

After considering the adequacy of the alternative forum (Martinique) and the deference owed to the Rassenger-Plaintiffs' choice of forum, the District Court balanced each of the public and private interest factors and granted the FNC motion, finding that Martinique was the more convenient forum for resolution of the damage claims. *Id.* at 45a-55a

As discussed *infra* at 9, both Orders were affirmed in *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009), *cert. denied sub nom. Bapte v. West Caribbean Airways*, No. 09-1199, 2010 WL 1526373 (U.S. June 7, 2010).

2. 2007—Petitioners Sue in Martinique

In August 2007, prior to the FNC dismissal of the Passenger Case, the Passenger-Plaintiffs commenced litigation in Martinique asserting products liability and negligence causes of action against Boeing, Pratt & Whitney, and United Technologies Corporation. None of the Passenger-Plaintiffs filed a lawsuit against any of the manufacturing defendants in the U.S. and Petitioners represented to the District Court that they did *not* intend to pursue their own product liability claims in the U.S. *See* Pet. App. at 6a, n.2; Opp. App. at 5a-6a.

While the appeal of the Passenger FNC Order was pending, Petitioners also sued Newvac and WCA in Martinique pursuant to the Montreal Convention. Although Petitioners made marginal attempts to comply with the District Court's order to re-file their actions in Martinique within six months of dismissal, they did so with the sole

intent to persuade the French courts to reject their claims. Petitioners instituted writs before the French court demanding that the French tribunal declare that it *lacked* jurisdiction to entertain the claims and refuse to accept jurisdiction. Pet. App. at 6a, n.2; Opp. App. at 5a, n.9.

On August 24, 2009, the French court in Martinique issued an order rejecting the Petitioners' claim that the French court lacked jurisdiction to entertain their claims. (Pet. App. at 8a, n.4. "By all accounts, the Passenger Case has successfully proceeded in Martinique. In those proceedings, as stipulated, the Carrier Defendants, including Newvac and West Carribean [sic] have conceded liability and waived the Montreal Convention damages caps, leaving only the calculation of damages at issue. Numerous Passenger Plaintiffs already have been awarded damages." Opp. App. at 7a (citations omitted).

3. September 2009—District Court Denies Petitioners' Rule 60(b) Motion

On August 28, 2009, also while the appeal of the Passenger FNC Order was pending, Petitioners moved the District Court in the Passenger Case for Rule 60(b) relief. Petitioners argued that in light the District Court's order denying defendants' FNC motion in the Crew Case (*see In re West Caribbean Crew Members*, 632 F. Supp. 2d 1193 (S.D. Fla. 2009) (Pet. App. at 12a-33a) ("Crew FNC Order"), the Passenger FNC Order granting dismissal was inequitable and the FNC public factors and the private factors no longer favored dismissal.

On September 11, 2009, the District Court denied the Rule 60(b) motion. *See* Pet. App. at 5a-11a. The District Court held that due to the pendency of the appeal, it had no jurisdiction to rule on the motion, and thus denied the motion for lack of jurisdiction. Nonetheless, the District Court informed the parties that it would have denied the motion on the merits if it had jurisdiction because Petitioners presented no equitable reason for the grant of relief. *Id.* at 6a.

The Court stated that the passenger claims in the French court and the product liability Crew Case were materially different and posed no danger of inconsistent results: in Montreal Convention cases, the carriers' fault is presumed; in product liability cases, complicated issues of product defect and causation on the part of the aircraft's manufacturers, lessors, lessees and owners must be addressed. *Id.* at 8a-9a. The Court noted that in the Montreal Convention cases pending before the French Court, WCA appeared, but that the District Court could not assert jurisdiction over WCA in Miami. *Id.* at 7a. The District Court also noted that under any theory, the Passenger-Plaintiffs would be entitled to one recovery and those damages would have to be assessed under the law of the place with the most significant relationship to the issue of damages. *Id.* at 9a. In the case of Petitioners, French law.

Finally, the District Court rejected the Petitioners' argument that "somehow the Court's May 13, 2009 order denying [the FNC motion] in the Crew Member Case, triggered the application of 28 U.S.C. § 1369 by establishing the Southern

District of Florida as the single forum for resolution of all claims arising out of the West Caribbean crash." Pet. App. at 9a. The Court correctly found that "the statute simply provides for this Court to have original jurisdiction over all claims arising from the disaster," and "[i]t was in the exercise of that jurisdiction that the Court determined that the doctrine of *forum non conveniens* warranted re-filing of the wrongful death claims arising under the Montreal Convention in the French court in Martinique." *Id.* at 9a-10a.

Petitioners appealed the Order denying the Rule 60(b) motion and that appeal was pending when the Court of Appeals issued its decision affirming the Passenger FNC Order.

4. October 2009—Court of Appeals Affirms Passenger FNC Order

On October 8, 2009, the Court of Appeals affirmed the Passenger FNC Order. *Pierre-Louis*, 584 F. 3d 1052. The Court of Appeals held that the Montreal Convention does not prohibit a court from dismissing a case on FNC grounds and found no merit to the Passenger-Plaintiffs' argument that the District Court abused its discretion in analyzing the relevant private and public interest factors. Thoroughly aware of the denial of the Crew Member FNC motion, the Court of Appeals addressed Petitioners' contention that the rulings were fundamentally inconsistent and found that because the product liability claims were distinct from the Passenger-Plaintiffs' claims under the Montreal Convention, there was no inconsistency. *Id.* at 1060, n.9.

After the denial of rehearing, Petitioners filed a Petition for a Writ of *Certiorari* on March 30, 2010 and *certiorari* was denied on June 7, 2010. *Bapte*, 2010 WL 1526373.

5. March 2010—Court of Appeals Affirms Denial of Rule 60(b) Motion

On March 25, 2010, the Court of Appeals affirmed the denial of Petitioners' Rule 60(b) motion. The Court found that the District Court's holding that it lacked jurisdiction to rule on the motion was harmless error, and affirmed the denial of the Rule 60(b) motion because the motion did not assert adequate grounds for relief from judgment because the "denial of a motion to dismiss the crew cases on *forum non conveniens* grounds did not make continued application of its dismissal of the passenger cases inequitable." Pet. App. at 4a. The Court of Appeals also rejected Petitioners' argument that vacation of the FNC Order was required because 28 U.S.C. § 1369 unconditionally permitted them to intervene in the Crew Case, stating: "We agree, however, with the district court's well-reasoned analysis on page four of its order explaining that 28 U.S.C. § 1369 merely provides the court with jurisdiction over all claims arising out of the disaster and that it exercised that jurisdiction when it applied the doctrine of *forum non conveniens* to dismiss the passenger cases." Pet. App. at 4a.

C. The In re West Caribbean Airways Crew Case

Concurrent with the Passenger Case litigation discussed above, representatives of 7 deceased

Colombian crew members brought wrongful death actions against American manufacturers, former owners and operators of the aircraft, and Newvac based on negligence and products liability in the Southern District of Florida. The 7 crew actions were consolidated before the District Court under *In re West Caribbean Airways Crew Members*, No. 07-22015 (S.D. Fla.).

1. September 2008 & May 2009—Denial of FNC Motions in the Crew Case

All defendants concurrently moved to dismiss the Crew Case (products liability claims) on FNC grounds. On September 30, 2008, the District Court denied FNC dismissal in favor of Martinique "mainly because the Court was not persuaded that a French (European Union) Court would have jurisdiction over the claims of the estates of the deceased Colombian crew members against U.S. corporations for an accident in Venezuela." Pet. App. at 8a, n.4; *see In re West Caribbean Crew Members*, No. 07-22015 (S.D. Fla. Sept. 30, 2008).

On May 14, 2009, the District Court denied a second FNC motion to dismiss the Crew Case but this time in favor of Colombia finding, *inter alia*, that the Crew Case involved few foreign plaintiffs and, therefore, the administrative burden on the court in Florida would not be excessive. Pet. App. at 29a-30a, 32a.

2. *August 2009—Petitioners' Motion to Intervene in the Crew Case*

Following the denial of the second FNC motion in the Crew Case in May 2009—three years after they filed their complaints in the U.S. and Martinique, and two years after the Crew Case was filed—on August 13, 2009, Petitioners moved to intervene in the Crew Case to assert their product liability claims against certain U.S. defendants. Both the Crew Member plaintiffs and defendants objected to the intervention.

Petitioners argued that 28 U.S.C. § 1369(d) provided them an unconditional and independent right to intervene and, in the alternative, that they are entitled to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(1). On January 8, 2010, the District Court denied the motion to intervene in the Crew Case as untimely, finding that § 1369(d) does not create a right to intervene outside of Rule 24, and the Petitioners' motion to intervene did not satisfy the timeliness requirements of Rule 24(a)(1). The Court concluded:

> In sum, the Bapte plaintiffs now seek to undo strategic decisions they made years ago. Their motives are highly questionable, and none of the relevant factors weighs in favor of intervention. Indeed, the Bapte Plaintiffs have not cited and the Court has not discovered a single case of record supporting intervention under similar circumstances. Thus, the Court, in its discretion, denies the Motion to Intervene as untimely.

Opp. App. at 28a.

Petitioners' appeal of this Order currently is pending before the Court of Appeals. *Bapte v. Boeing Co.*, No. 10-10501 (11th Cir. docketed Feb. 4, 2010).

3. May 2010—The Crew Case Settles and Is Dismissed

In the meantime, the Crew Member plaintiffs and the defendants engaged in settlement discussions, and they informed the District Court of a pending settlement on May 24, 2010. On June 21, 2010, the District Court issued an Order of Dismissal. Opp. App. at 30a. This too has now been appealed by Petitioners to the Court of Appeals (albeit their standing to do so is not readily apparent.). *In re West Caribbean Crew Members*, No. 07-22015 (S.D. Fla. Notice of Appeal filed July 19, 2010).

REASONS FOR DENYING THE WRIT

Petitioners present two questions for review based on an alleged misapplication of the Multiparty, Multiforum Trial Jurisdiction Act of 2000 ("MMTJA"), 28 U.S.C. § 1369 *et seq.* by the Courts below. Interwoven throughout the Petition are arguments that the District Court also erred because the denial of the Rule 60(b) motion precluded them from intervening in the Crew Case to re-assert their Montreal Convention claims.

As an initial matter, in light of the fact that the Crew Case has been settled and dismissed (Opp. App. at 30a-32a), there is no longer any case in which Petitioners can intervene and the questions

presented for review are rendered moot. The Petition should be denied on this ground alone.

Even if the Petition is not moot, it fails to present any question requiring review. Regardless of how the Petitioners frame the "Questions Presented," the Petition is in actuality a second request to review the Passenger FNC Order. In the first Petition for Writ of *Certiorari* filed on May 5, 2010, Petitioners maintained, *inter alia*, that the Courts below misapplied the Montreal Convention and the public and private factors governing the application of FNC. This Court denied *certiorari*. *Bapte*, 2010 WL 1526373. Now, Petitioners request review of the denial of a Rule 60(b) motion that sought to vacate the same FNC Order, but this time based on an alleged misapplication of the MMTJA. Neither the alleged misapplication of the MMTJA nor the propriety of intervention were presented by Petitioners in their opposition to the FNC motions, on appeal of the Passenger FNC Order, or in the first Petition for Writ of *Certiorari*. Thus, the only question that may properly be considered by the Court for review at this time is whether the decision of the Court of Appeals finding that the District Court did not abuse its discretion in denying the Rule 60(b) motion conflicts with the any decision of this Court or a Court of Appeals. Any other issue is untimely or has been waived.

I

THE PETITION SHOULD BE DENIED ON THE GROUNDS OF MOOTNESS BECAUSE THE CREW CASE HAS BEEN SETTLED AND DISMISSED

Petitioners seek review of the denial of their Rule 60(b) motion which sought to vacate the Passenger FNC Order in order to allow them to obtain "uniform redress and relief," avoid duplicative litigation and costs and prevent inconsistent factual findings and results stemming from separate lawsuits. Petition at 5, 9-11, 15. In light of the settlement and dismissal of the Crew Case, the Petition should be denied as moot. *See* Opp. App. at 30a-31a.

Mootness is a jurisdictional question because the exercise of judicial power under Article III of the Constitution depends on the existence of a live case or controversy. U.S. CONST. art. III § 2; *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *see also Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla.* v. *Machen*, 586 F.3d 908, 918 (11th Cir. 2009) ("We lack the power to retain jurisdiction over a moot controversy for the purpose of rendering an advisory opinion."). Thus, a case is moot when the court cannot provide meaningful relief. *Florida Ass'n of Rehab. Facilities, Inc.* v. *Fla. Dep't of Health and Rehab. Servs.*, 225 F.3d 1208, 1217 (11th Cir. 2000).

Shortly before the filing of the Petition, the Crew Case was settled by the parties and the District Court dismissed the action in its entirety on July 21, 2010. Opp. App. at 30a-31a. Thus, the

alleged concerns of Petitioners no longer apply—there is in fact *no* risk of inconsistent factual findings and *no* risk of additional costs associated with duplicative lawsuits.

The Petition should be denied as there is no case in which Petitioners could intervene.

II

THE DECISIONS OF THE COURTS BELOW DO NOT CONFLICT WITH THE LANGUAGE OR INTENT OF THE MMTJA

Petitioners invite this Court to consider the interplay between 28 U.S.C. §1369 and the doctrine of FNC—an argument that was available at all times but never presented to the District Court, the Court of Appeals or this Court. Contending that intervention is mandatory, Petitioners argue that the District Court abused its discretion when it failed to vacate the Passenger FNC Order so that the Petitioners could intervene to re-assert their Montreal Convention claims and obtain "relief" (*i.e.*, damages) in the Crew Case.

The crux of Petitioners' argument appears to be that all proceedings subject to 28 U.S.C. §1369 must be "consolidated into a single, Multi-District Litigation proceeding," and that once "consolidated," FNC dismissal of less than all actions is prohibited. Petition at i, 14. Petitioners' "all or nothing" approach to FNC dismissal is legally baseless, demonstrates a fundamental misapprehension of §1369 and the MDL procedure process under 28 U.S.C. §1407, and largely ignores the

particular facts and legal arguments presented (and not presented) to the Courts below. In effect, Petitioners improperly seek to use Rule 60(b) to present arguments that should have been presented to the district or appellate court, but were not, in another attempt to attack the Passenger FNC Order affirmed by the Court of Appeals.

A. The Alleged Misapplication of the MMTJA Was Never Argued as a Basis to Deny FNC Dismissal of the Passenger Case

During the pendency of their actions, Petitioners never moved to consolidate the Passenger Case with the Crew Case; never sought to intervene in the Crew Case; and never argued, in opposing FNC dismissal or seeking reversal of the Passenger FNC Order, that the MMTJA required consolidation and precluded FNC dismissal of the passenger actions. In fact, the argument that the MMTJA somehow precludes FNC dismissal was not presented in the Rule 60(b) motion in the District Court and was only alluded to on appeal of the Rule 60(b) motion and in the motion to intervene in the Crew Case filed on August 13, 2009.

Petitioners now seek to excuse their failure to timely raise these arguments by claiming that the MMTJA arguments were somehow not available until the May 13, 2009 denial of the Crew FNC motion, at which time the MMTJA sprang into effect to create what Petitioners refer to as §1369 "anchor" jurisdiction. Petitioners argue:

- "The rejection of FNC for the Crew drastically changed the circumstances

surrounding the previous FNC dismissal of Petitioners' case because it, for the first time, established a §1369 action for all who died in the Flight 708 accident." (Petition at 8);

- "It was not until the District Court's May 13, 2009 Order denying FNC dismissal in the Crew Members action [App. 3] that Petitioners first learned that the District Court considered itself to be the most convenient forum to adjudicate a 28 U.S.C. §1369 proceeding for the instant airline disaster." (Petition at 18)[2]; and
- "Once the Crew Members jurisdictionally established a §1369 proceeding in the District Court, Petitioners filed their Rule 60(b) Motion for Relief asking the District Court to grant relief from the prior FNC Order dismissing their case." (Petition at 9).

Petitioners' arguments are incorrect.

Jurisdiction under §1369 either exists or not based on the facts of the cases when filed – it does not somehow later "spring" into existence. Here, the facts as to whether §1369 jurisdiction was pre-

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[2] "The Court did not, as [Petitioners] argue, in its May 2009 order denying *forum non conveniens* dismissal in the Crew Member Case 'consider itself the most convenient forum to adjudicate the product liability and negligence claims of foreign plaintiffs.' The Court decided only the issue before it, *i.e.*, that it was a more convenient forum for the claims of the Crew Member Plaintiffs than was Colombia." Opp. App. at 17a, n.16 (citations omitted).

sent existed on the date the complaints were filed and had nothing to do with the May 2009 Crew FNC Order. Petitioners overlook:

- the Crew Case complaint asserted §1369 as the basis for jurisdiction;
- both the *Galbert* Plaintiffs and the *Cadare* Plaintiffs complaints asserted §1369 as the basis for jurisdiction;
- this same alleged "anchor" jurisdiction Petitioners claim was created by the May 2009 denial of the crew member FNC motion seeking dismissal in favor of Colombia would also have been created with the September 2008 denial of the crew member FNC motion seeking dismissal in favor of Martinique; and
- More than one year before the May 2009 Crew FNC Order was issued, Petitioners specially asserted in the "Statement of Jurisdiction" in their opening appellate brief of the appeal of the Passenger FNC Order that "the District Court had original jurisdiction over these actions pursuant to 28 U.S.C. §1369, the Multiparty, multiform jurisdiction provision. . . ." [sic]. Appellants' Initial Consolidated Brief, No. 07-1528 at 2 (11th Cir. filed on Mar. 24, 2008).

Thus, there is no excuse for Petitioner's failure to present the MMTJA arguments in their FNC opposition papers or appellate briefs related to the

Passenger FNC Order or to the District Court below in the Rule 60(b) motion. Petitioners' argument is waived.

Indeed, it was not until Petitioners filed their Rule 60(b) motion that they informed the District Court that they moved to intervene in the Crew Case and that the MMTJA supported such intervention. Similarly, it was not until Petitioners moved in August 2009 to intervene in the Crew Case that they argued FNC denial of the Passenger Case was precluded by the MMTJA. Petitioners now fault the Courts below for not specifically addressing each of their MMTJA arguments (Petition at 10) even though they presented no argument in support of this contention. *See* Opp. App. at 5a, n.8 ("neither the Bapte Plaintiffs, nor any other Passenger Plaintiffs, argued that 28 U.S.C. § 1369 required that all litigation involving the subject accident be resolved in this forum, which the Bapte Plaintiff now belatedly argue in their Motion to Intervene"). The only issue which the District Court could properly consider under Rule 60(b) was whether inequity resulted from the Passenger FNC Order.

1. Petitioners' MMTJA Arguments Have Been Waived

Even if the Rule 60(b) motion can be construed to have raised the MMTJA argument, the argument was improper and waived because it should have been but was not presented to the District Court and the Court of Appeals with respect to the Passenger FNC motion and appeal. An appeal of a ruling on a Rule 60(b) motion is narrow in scope,

addressing only the propriety of the denial or grant of relief and does not raise issues in the underlying judgment for review. *See Browder v. Dir., Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1978); *Am. Bankers Ins. Co. of Fla. v. Nw. Nat'l Ins. Co.*, 198 F.3d 1332, 1338 (11th Cir. 1999). Because of this limitation, the law is clear that Rule 60(b) may not be used to challenge mistakes of law which could have been raised on direct appeal. *Am. Bankers Ins.*, 198 F.3d at 1338; *see Ackerman v. U.S.*, 340 U.S. 193, 197-202 (1950) (a party may not use a Rule 60(b) motion as a substitute for an appeal, or as here, as a vehicle for a second appeal on the identical issue).

Petitioners' Rule 60(b) motion was simply a demand that the District Court revisit the Passenger FNC Order. As grounds for their Motion for Rule 60(b) Relief, Petitioners argued that the District Court's May 13, 2009 denial of the Crew Member FNC motion constituted changed circumstances which made continued application of the FNC dismissal inequitable. In light of this ruling, Petitioners claimed that the District Court weighed the FNC factors improperly. In other words, Petitioners focused on the merits of the underlying order and contended that the only equitable remedy would be to vacate the FNC Order. Pet. App. at 9a-11a. This very issue was addressed by the Court of Appeals in the decision affirming the Passenger FNC Order:

> The district court recently denied a dismissal on *forum non conveniens* grounds in the related case brought by the crew members who perished in the same crash

> as Plaintiffs. *In re: West Caribbean Airways Crew Members*, 632 F. Supp. 2d 1193 (S.D. Fla. 2009). Plaintiffs point out that the crewmembers, like Plaintiffs, are non-U.S. residents, and therefore litigation of their claim in a U.S. court gives rise to the same evidence issues the district court relied upon in dismissing their case on *forum non conveniens* grounds. We disagree. The crew member claims are product liability claims and thus are distinct from Plaintiffs' claims under the Montreal Convention, pursuant to which liability is presumed. We are therefore not persuaded that the district court's *forum non conveniens* analysis as to Plaintiffs' claims is inconsistent with, or should be affected by, its adjudication of the crew member claims in a U.S. forum.

Pierre-Louis, 584 F.3d at 1060, n.9.

The District Court's Order on the Rule 60(b) motion reflected this argument. The District Court considered the two actions and concluded that the Passenger Case was materially distinct from the product liability claims in the Crew Case and that the French court was the superior forum for the determination of damages in the Passenger Case. Pet. App. 6a-11a. The Courts below properly rejected the notion that 28 U.S.C. §1369 was anything more than a jurisdictional statute and the rulings of the Courts below effectively recognize that an appeal of a Rule 60(b) motion may not reargue the merits of an order which has been affirmed by the Court of Appeals. Pet. App. at 3a-4a, 9a-10a.

2. Petitioners' Rule 60(b) Motion Was Untimely

Finally, the underlying Rule 60(b) motion was itself untimely. Although the Rule 60(b) motion was denominated as a Rule 60(b)(5) and (6) motion, referring to those sub-parts which control motions to vacate based on "equitable" concerns, the motion was so named so as to step outside of the confines of Rule 60(b)(1), which mandates that a motion to vacate based on "mistakes," including mistakes in the law, be filed within one year from the entry of the final judgment. *See* Fed. R. Civ. P. 60(c).

The substance of Petitioners' Rule 60(b) motion was that the Passenger FNC Order was a result of a mistake in the law—the District Court incorrectly weighed the private and public interest factors and failed to properly apply the MMTJA (which was not fully articulated to the District Court in the Rule 60(b) motion). This is a mistake of law that falls under Rule 60(b)(1) and must be made within *one year* from entry of the order sought to be vacated. Fed. R. Civ. P. 60(c)(1).

It is well settled that Rule 60(b)(1) and Rule 60(b)(6) motions are mutually exclusive, and that a district court cannot grant relief under Rule 60(b)(6) for any reason the court could consider under (b)(1). *Cavaliere v. Allstate Ins., Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993). The Passenger FNC Order was entered on November 13, 2007, and Petitioners Rule 60(b) motion was not filed until August 28, 2009, almost 22 months later. Accordingly, Petitioners' motion was untimely. *See* Fed. R. Civ. P. 60(c); *United States*

v. $1,449,473.32 in U.S. Currency, 152 Fed. Appx. 911, 912 (11th Cir. 2005).

The issues raised in the Petition herein were waived or untimely because Petitioners did not argue those issues to the Courts below or even to this Court, and a belated Rule 60(b) motion could not be used to assert these new arguments. Accordingly, the Rule 60(b) decisions of the Courts below were not an abuse of discretion and in no way conflict with Rule 60(b) or the MMTJA.

B. Even If Petitioners' MMTJA-Based Arguments Had Been Properly Presented, the Decisions of the Courts Below Do Not Conflict with the Language or Purpose of the MMTJA

Contrary to Petitioners' arguments, 28 U.S.C. §1369 does not limit the District Court's inherent discretion whether to order consolidation (Fed. R. Civ. P. 42), FNC dismissal, or intervention (Fed. R. Civ. P. 24).

1. Consolidation Is Not Mandatory

Petitioners argue that the failure to consolidate the Passenger and Crew Cases, and the denial of FNC dismissal of the Crew Case but grant of FNC dismissal in the Passenger Case conflicts with the MMTJA because (1) the MMTJA mandates that one litigation result in one judgment following an accident, and (2) even though §1369 allows FNC challenges, those challenges were required to apply to the entire action and not to particular plaintiffs. Petition at 13-14.

The purpose of the MMTJA is to address inefficiencies and inconsistencies of duplicate litigation arising from a single mass tort in cases where many lawsuits are filed in different jurisdictions (state and federal court) by different plaintiffs. It is intended to encourage joint adjudication through mechanisms designed to join additional related claims to claims already pending in federal court and to facilitate removal from state court. Thus, the MMTJA is a jurisdictional device allowing for consolidated proceedings before a single district court judge. *See* Rafouth, A., *Congress and the Multiparty, Multi forum Trial Jurisdiction Act of 2002: Meaningful Reform or A Comedy of Errors?*, 54 Duke L. J 255 (2004). The statute, however, does not affect a district court's inherent right to make its own substantive and procedural rulings, and thus it could have no effect on the District Court's discretion to dismiss the Passenger Case on FNC grounds. Contrary to Petitioners' contentions, the MMTJA does not permit or require a "consolidated" damage trial. *See infra* at 26-29.

Misapprehending the parameters of §1369, Petitioners argue that the District Court erred in failing to notify the Judicial Panel on Multidistrict Litigation ("JPMDL") of the pendency of the actions (Petition at 8, n.3, 16). No such notice was required. The Panel exists solely to determine whether cases "pending in different districts" should be transferred to a single district "for coordinated or consolidated pretrial proceedings" before a single judge. *See* 28 U.S.C. §1407(a); Herr, David F. *et al.*, *The Judicial Panel's Role in Managing Mass Litigation*, SN066 ALI-ABA 249,

254-255 (2008). In this case, no notification to the JPMDL was needed for the obvious reason that both the Passenger Case and the Crew Case were already before a single district court judge. Thus, there was no action that the JPMDL could transfer to the District Court for "*coordinated* or consolidated pretrial proceedings." 28 U.S.C. §1407(a). It is not clear what Petitioners claim the JPMDL could have done even if notice was provided—it had no authority to act under §1407 as the actions were not "pending in different districts" or, as discussed below, to consolidate the actions for liability or damage trial.

Next, the Petitioners complain that the failure to notify the JPMDL resulted in two separate cases, not one consolidated case, which allegedly was required under the MMTJA. Again, Petitioners are wrong. The function of the JPMDL is purely managerial and not adjudicative. *See* Herr, David F., *Multidistrict Litigation Manual, Practice Before the Judicial Panel on Multidistrict Litigation* at § 3.1 at 18 (West Publ. 2010). The JPMDL does not have the power to make any decision of a substantive or procedural nature or make any other orders in the actions. *Id.* The district court alone has the power to make procedural ("consolidation" vs. "coordination", FNC, intervention) and substantive rulings regarding its case. *See In re Am. Online Spin-Off Accounts Litigation*, 310 F. Supp. 2d 1369, 1370 (J.P.M.L. 2004) (Panel leaves to transferee court to distinguish between "coordination" and "consolidation"); *In re "Factor VIII or IX Concentrate Blood Products" Products Liability Litigation*, 303 F. Supp. 2d 1377 (J.P.M.L. 2004) (same); *In re Medical*

Waste Services Antitrust Litigation, 277 F. Supp. 2d 1382, 1383 (J.P.M.L. 2003) ("we leave the degree of coordination or consolidation of this action with the other actions to the discretion of the transferee judge").

Here, the District Court exercised its discretion. In response to a motion by the *Galbert* Plaintiffs, the District Court exercised its discretion to consolidate all the Passenger-Plaintiffs cases. In response to the defendants' motion to consolidate the seven crew member claims, the District Court consolidated all of the Crew Cases. At no time did the Petitioners move to consolidate the two cases, for intervention in the Crew Case, or complain to the District Court that such separate proceedings violated the MMTJA. Indeed, Petitioners advised the District Court that they had *no intention of filing claims against the manufacturers in the U.S.* *See* Opp. App. at 6a. Recognizing that the Montreal Convention claims and the product liability claims were materially distinct, it was thus within the discretion of the District Court to keep the two distinct cases separate and to dismiss one and not the other—the Passenger Case involved presumed liability under the Montreal Convention and *damages issues only*; the Crew Case involved product liability claims where *liability and damages* were contested.

2. FNC Dismissal Is Not Prohibited

Petitioners contend that the FNC decisions in the Passenger Case and Crew Case offend the MMTJA because the District Court came to different conclusions regarding the respective FNC motions. Petitioners offer no support for this con-

tention and nothing in the MMTJA requires consolidation or prohibited FNC dismissal of the Passenger Case. In fact, actions removed to federal court from state court pursuant to §1369, for instance, are clearly subject to an FNC analysis. *See* 28 U.S.C. §1441(e)(6) ("Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.").

While Petitioners admit that §1369 allows FNC motions, they claim such motions must address the "entire" action. Petition at 14, n.7. Again, Petitioners offer no authority to support that Congress sought to so limit the court's discretion—there is none. *See* Opp App. at 19a, n.18.

As originally drafted, one of the purposes of the MMTJA was to address the issue raised by the Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), by "bestow[ing] original jurisdiction on federal district courts in civil actions involving minimal diversity jurisdiction among adverse parties based on a single accident where at least 75 persons have died" and to allow "the district court in which such cases are consolidated . . .[to] retain those cases for determination of liability and punitive damages." H.R. Conf. Report No. 107-685 at 176 (2002); *Meaningful Reform*, 54 Duke L. J at 277-82. In this regard, 28 U.S.C. §1407 was to be amended to add sub-section (f) which would have allowed the MDL transferee court to retain the action for determination of liability and punitive damages. H.R. Rep. No. 107-14 at 7-8 (2001). While §1407(j) was not contained in the final ver-

sion enacted (though the reference remains in 28 U.S.C. §1441(e)(2)), the MMTJA drafters recognized that "damage issues often do not lend themselves to consolidated treatment because of necessary factual determinations relating to individual injury." *Meaningful Reform*, 54 Duke L. J at 270. In fact, 28 U.S.C. §1441(e)(2) recognizes that consolidation for "damages" was neither required nor necessary and, therefore, provides for remand of removed cases for damages trials once liability has been determined.

Petitioners ignore that the only issue that remained in the Passenger Case was the determination of damages of French plaintiffs under French law. Unlike the Crew Case where liability was at issue, Petitioners insisted, and Respondents agreed, only damages, not liability was at issue in the Passenger Case. *See* Pet. App. at 46a ("the parties agree[d] that with respect to the Montreal Convention claims, Defendants' liability will not be at issue" and that the principle contention will be the amount of damages); *see also* Opp. App. at 9a, n.14. Thus, not only is there nothing in the MMTJA that precluded FNC dismissal of the Passenger Case, FNC dismissal was fully consistent with the language and purpose of the MMTJA because only the determination of damages remained. In denying the Rule 60(b) motion, District Court correctly observed:

> [I]t is obvious that litigation in Martinique on the Montreal Convention claims will best serve the "Bapte" Plaintiffs' interests. Unlike in the Crew Member Case where liability is contested and

> not likely to be resolved for some time, the "Bapte" Plaintiffs and the estates of the other passengers will be able to obtain a prompt and possibly full recovery in the French court.
>
> In sum, the "Bapte" Plaintiffs have failed to demonstrate that continued application of the FNC Order is no longer equitable or that any other of the reasons they cite justifies relief. In fact, the French court in Martinique clearly can provide speedier and more complete justice than possibly can be provided in this forum. Therefore, the FNC Order was and remains entirely in the "Bapte" Plaintiffs' interests and legally correct.

Pet. App. at 10a.

The interplay and effect of the Passenger FNC Order and the denial of the Crew Member FNC motion has been addressed (twice) by the Court of Appeals. In the Order affirming the Passenger FNC Order, the Court of Appeals found that the District Court's FNC analysis as to the Passenger Case claims was *not inconsistent* with the analysis in the Crew Case. *Pierre-Louis*, 584 F.3d at 1060, n.9. In affirming the denial of the Rule 60(b) motion, the Court of Appeals again found that the "denial of a motion to dismiss the crew cases *on forum non conveniens* grounds did not make continued application of its dismissal of the passenger cases inequitable." Pet. App. at 4a. Thus, the FNC decisions in both the Passenger and Crew Cases were consistent with the MMTJA because the MMTJA addresses *inconsistencies* of duplicate

litigation—here, there was no duplicate litigation. As the District Court explained in denying Petitioners' motion to intervene in the Crew Case:

> The Passenger Plaintiffs never asserted product-liability claims in this Court, and the Crew Member Plaintiffs never asserted Montreal Convention claims in this Court. And although both cases originated in the Southern District of Florida, only one remains. As discussed below, in 2007, the undersigned dismissed the Passenger Case in favor of the more convenient forum of the French court in Martinique, but when the appropriateness of transfer to the French court in Martinique was litigated a year later in the Crew Member Case, the independent circumstances of that case prevented a similar dismissal.

Opp. Pet. at 4a.

The Courts below have twice determined that the Passenger FNC Order was proper. Thus, no part of those decisions conflicts with the MMTJA.

3. Intervention Is Not Mandatory

While intervention was not asserted as a ground for Rule 60(b) relief (Pet App. at 10a), Petitioners argue that the District Court abused its discretion in failing to vacate the FNC Order because §1369(d) entitled them to mandatory intervention in the Crew Case to re-assert their dismissed Montreal Convention claims. Petition at 17-18. Again, this argument is without merit.

No statute provides for intervention in a civil case outside of the requirements of Fed. R. Civ. P. 24. *See, e.g., Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 525-26 (1947) (acknowledging interplay between Rule 24 and statutorily-created right to intervene); *see also Iridium India Telecom Ltd. v. Motorola, Inc.*, 165 Fed. Appx. 878, 879 (2d Cir. 2005). Because repeals by implication are not favored, *United States v. Aguilar*, 515 U.S. 593, 616 (1995), had Congress intended to repeal Rule 24 in this case, it would have explicitly and unambiguously done so. It did not, and thus the right to intervene is interpreted within the confines of Rule 24(a) which allows intervention as of right if "on ***timely*** motion." *See N.A.A.C.P. v. New York*, 413 U.S. 345, 366 (1973).

Petitioners never moved to intervene in the Crew Case to assert their Montreal Convention claims, but shortly before filing their Rule 60(b) motion, Petitioners moved to intervene in the Crew Cases to assert the same product liability claims as those brought by the Crew Members. On January 8, 2010, the District Court denied their motion to intervene. The District Court found that intervention pursuant to §1369(d) was not mandatory and, after considering the timeliness factors for intervention as of right under Rule 24(a), concluded that Petitioners' motion was untimely. *See* Opp. App. at 28a.

Thus, Petitioners' argument that the Passenger FNC Order and the denial of Rule 60(b) relief precluding them from intervening in the Crew Case are "unjust" and "unfair" because of an alleged

disparity in damage awards is baseless. In rejecting a similar argument presented in the motion to intervene, the District Court stated that "if the Bapte Plaintiffs' were so concerned about the application of U.S. law, they ought to have filed their product-liability claims in this jurisdiction three years ago." Opp. App. at 25a, n.25. The Court explained:

> . . . the Bapte Plaintiffs explicitly argue in their Reply that they are now seeking damages under U.S. law as opposed to the one-hundred percent of damages under French law being offered to them in Martinique and notwithstanding that they have product-liability claims that have been pending in the French court for over two years. (D.E.375.) But the Court is not convinced this is a valid purpose for seeking what is essentially a transfer of venue from Martinique.

Opp. App. at 25a. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981) (conclusive and substantial weight should *not* be given to whether one forum's substantive law is more favorable to another's in the FNC analysis).

The decisions of the Courts below are correct and do not conflict with the language or purpose of the MMTJA.

III

THE RULE 60(B) DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR THE COURTS OF APPEALS

Petitioners' Rule 60(b) motion relied on Rule 60(b)(5) and (6). Rule 60(b)(5) provides grounds for relief only when a judgment applies "prospectively," and "only when that prospective application is inequitable." *See* 12 James Wm. Moore et al., Moore's Federal Practice §60.47 (3d ed. 2010).[3] Rule 60(b)(6), which sets forth a "catch-all" provision, provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances. *See Coltec Indus.*, 280 F.3d at 273. The district court has broad discretion in ruling on a Rule 60(b) motion, subject to review only for an abuse of discretion. *See Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006); *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1317 (11th Cir. 2000); *see also Agostini v. Felton*, 521 U.S. 203, 238 (1997). In light of foregoing, the District Court and Court of Appeals did not abuse their discretion and properly denied Rule 60(b) relief.

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[3] Petitioners are not entitled to relief under Rule 60(b)(5) because the Passenger FNC Order does not have prospective application within the meaning of the rule. *See Gibbs v. Maxwell House*, 738 F.2d 1153, 1155-56 (11th Cir. 1984) (fact that plaintiff remains bound by an order is not a prospective effect within the meaning of Rule 60(b)(5)); *Maraziti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995); *see also Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 272 (3d Cir. 2002) (dismissal orders generally not prospective).

The Courts below correctly determined that no equitable reason warranted the vacation of the Passenger FNC Order requiring the Petitioners to litigate their claims in Martinique. The Courts recognized that the products liability claims and Montreal Convention claims were materially distinct and, therefore, the lack of intervention in the Crew Case would not result in duplicative litigation. Moreover, the Courts below found that the advantages of the litigation in Martinique (*i.e.*, the presence of WCA, the concession of liability, the waiver of damage caps) better served the interests of Petitioners than the speculative possibility of recovery in the products liability lawsuit. *Pierre Louis*, 584 F.3d at 1060, n.9; Pet. App. at 7a-10a. Indeed, the District Court correctly noted that the Petitioners were entitled to only one recovery—regardless of the theory—and so, where the Petitioners were already receiving 100% of their damages in Martinique, intervention in the crew cases had no real purpose. Pet. App. at 9a.

Nevertheless, in an effort to find a ground for *certiorari*, Petitioners assert that the Court's application of Rule 60(b)(5) and (6) below is in conflict with this Court's decision in *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965) and the Tenth Circuit's decision in *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975), which they claim set forth a general rule that individuals injured in the same accident must always be afforded the same relief. Neither *Gondeck* nor *Pierce* supports such a sweeping conclusion.

In *Gondeck*, 382 U.S. 25, which arose out of a motor vehicle accident involving military personnel on San Salvador Island, this Court granted relief based on "'intervening circumstances of substantial * * * effect,'" because: (1) the district court and Fifth Circuit misinterpreted Supreme Court precedent to deny recovery to the wife of an individual killed in the accident; (2) the Fourth Circuit properly reached the opposite conclusion on the relevant issue and granted relief to one of the other victims; (3) the Fifth Circuit itself expressed doubt in a subsequent case as to whether its decision in *Gondeck* was correct; (4) this Court reversed the only decision that stood alongside the Fifth Circuit's opinion in *Gondeck*; and (5) the petitioner was the only victim of the accident not to receive compensation even though the relevant facts and law were identical for each of the victims. *Id.* at 26-28.

In *Pierce v. Cook & Co.*, 518 F.2d 720, the Tenth Circuit granted Rule 60(b)(6) relief to the surviving widow of a man killed in a motor vehicle accident because the federal court in which she was forced to litigate denied her recovery based on established Oklahoma Supreme Court precedent that was subsequently reversed by the Oklahoma Supreme Court in an appeal by another victim of the same accident who litigated the case in state court. *Id.* at 721-22. The Court found that because the plaintiffs were forced to litigate in the federal court, and the results in a federal court sitting in diversity should be the same as those in state court litigation arising out of the same transaction or occurrence, the different results of the state and federal court litigation constituted an

"extraordinary situation" sufficient to warrant relief under Rule 60(b)(6). The court vacated its prior judgment and remanded the case for further proceedings. *Id.* at 723-24.

Relying on *Gondeck* and *Pierce*, Petitioners argue that individuals who are injured in the same accident are solely for that reason entitled to "recover damages commensurate with those recovered by other victims of the same . . . accident." Petitioner at 23. Petitioners' position is wrong and ignores that pursuant to choice of law rules, courts often apply differing liability and damage laws to parties *even in the same litigation*. In any event, neither *Gondeck* nor *Pierce* sets forth such a rule, and unlike in *Gondeck* and *Pierce*, in this case:

- there was no change in the law;
- there is no question that Petitioners will receive compensation in accordance with the applicable damage law;
- the Crew Case and the Passenger Case were before the same court;
- the relevant legal doctrine (FNC) was applied in the same manner (*i.e.*, the same factors were applied) in both the Crew Case and the Passenger Case; and
- the Crew Member plaintiffs and Passenger-Plaintiffs were not similarly situated with regard to the FNC analysis. Their claims involved different theories of law, different defendants,

> different issues and different evidence—in the Passenger Case, liability was not at issue and hundreds of foreign plaintiffs were involved; in the Crew Case, liability and damages were at issue and there were relatively few foreign plaintiffs involved.

The decision of the Court of Appeals does not conflict with the holding or rationale of *Gondeck* or *Pierce*.

CONCLUSION

The Petition fails to set forth any reason for review to be granted—there is no conflict with the language or purpose of the MMTJA, there is no conflict among the Circuits, and there is no conflict with a decision of this Court. For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Dated: August 2, 2010

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 07-22015-CIV-UNGARO
Consolidated Cases

IN RE: WEST CARIBBEAN AIRWAYS
CREW MEMBERS

ORDER ON MOTION TO INTERVENE

THIS CAUSE is before the Court upon the Motion to Intervene by the Bapte Plaintiffs[1] and Incorporated Memorandum of Law (the "Motion to Intervene") (D.E. 342), filed on August 13, 2009; the Bapte Plaintiffs' Request for Oral Argument (D.E. 345), filed on August 13, 2009; and, the Bapte Plaintiffs' Motion for Clarification (D.E. 395), filed on December 16, 2009.

THE COURT has considered the motions and the pertinent portions of the record and is otherwise fully advised in the premises.

[1] Although not identified in the Motion to Intervene, the Bapte Plaintiffs are identified in Exhibit "1" to the Bapte Plaintiffs' proposed Intervener's Consolidated Complaint for Damages. (D.E. 344-1, Ex. 1.) The Bapte Plaintiffs are too numerous for the Court to list, and so the names included in that Exhibit "1" are incorporated herein by reference. (D.E. 344-1, Ex. 1.)

Background

On August 16, 2005, a McDonnell Douglas MD-82 aircraft (the "Subject Aircraft"), operated by West Carribean Airways, a Colombian airline, en route from Panama to Martinique, crashed in Venezuela. All of the passengers and crew were killed.[2] (D.E. 141, hereinafter "3d Am. Compl," ¶¶ 62, 67–68 & 77–78.) None of the deceased were United States citizens or residents. The "Passengers" were all residents of Martinique.[3] (06-22748, D.E. 152 ¶¶ 7 & 74.) And the "Crew Members" were all Colombian citizens and residents. (3d Am. Compl. ¶¶ 4–10.) In 2006 and 2007, two separate lines of litigation ensued: that regarding the Passengers' deaths (the "Passenger Case") and that regarding the Crew Members' deaths (the "Crew Member Case"). The Passenger Case and the Crew Member Case proceeded independently, with each set of Plaintiffs bringing claims against separate groups of defendants under distinct theories.

In the Passenger Case, the heirs and representatives of numerous deceased passengers (the "Passenger Plaintiffs"), including the Bapte Plaintiffs, filed lawsuits in this Court pursuant to the

[2] The factual allegations of the Third Amended Complaint do not differ in any relevant respect from those of the Bapte Plaintiffs' proposed Intervener's Consolidated Complaint for Damages. (D.E. 344-1.) In fact, the proposed Intervener's Consolidated Complaint for damages is predominantly a cut-and-paste of the Third Amended Complaint.

[3] All but one of the Passengers were French nationals; the remaining Passenger was an Italian national. (06-22748, D.E. 159.)

Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Montreal, Canada on May 28, 1999 (the "Montreal Convention")[4] against Newvac Corporation ("Newvac"), Go 2 Galaxy, Inc. ("Go 2 Galaxy"), and West Carribean Airways ("West Carribean") (collectively, the "Carrier Defendants").[5] (06-22748, D.E. 43-1.) Contrastingly, in the Crew Member Case, the heirs and representatives of the estates of the Crew Members (the "Crew Member Plaintiffs") filed lawsuits in this Court under theories of negligence, willful misconduct, and strict liability against numerous "U.S. Defendants"[6] which were involved in the man-

[4] The Montreal Convention exclusively governs the rights and liabilities of passengers and carriers in international air transportation. *See El Al Israel Airlines, Ltd. v. Tsui Yuang Tseng*, 525 U.S. 155, 161 (1999). Accordingly, because the Carrier Defendants qualified as "carriers," the Montreal Convention exclusively governed their liability to the Passengers.

[5] These lawsuits were consolidated into a single case, *In re West Carribean Airways, et al.*, Case No. 06-22748-Civ-Ungaro. (06-22748, D.E. 43-1.)

[6] Newvac is the only Carrier Defendant from the Passenger Case included as a U.S. Defendant in the Crew Member Case; the remaining U.S. Defendants are: The Boeing Company ("Boeing") and United Technologies Corporation ("United Technologies") which manufactured and supplied the Subject Aircraft and its engines, respectively; Pratt & Whitney Engine Services, Inc. ("Pratt Engine") and Pratt & Whitney Canada Corporation ("Pratt Canada")—a Canadian entity and the only non-domestic U.S. Defendant—which supplied replacement parts and repair services for the Subject Aircraft's engines; Honeywell International, Inc. ("Honeywell") which provided avionics and replacement parts for the Subject Aircraft and its engines; Pacific Harbor Capital,

ufacture, maintenance, repair, ownership, and operation of the Subject Aircraft prior to the crash.[7] (3d Am. Compl. ¶¶ 11-21, 79–178.)

The Passenger Plaintiffs never asserted product-liability claims in this Court, and the Crew Member Plaintiffs never asserted Montreal Convention claims in this Court. And although both cases originated in the Southern District of Florida, only one remains. As discussed below, in 2007, the undersigned dismissed the Passenger Case in favor of the more convenient forum of the French court in Martinique, but when the appropriateness of transfer to the French court in Martinique was litigated a year later in the Crew Member Case, the independent circumstances of that case prevented a similar dismissal.

Inc. ("PHC") which, from 1986 through January 5, 2005, owned the Subject Aircraft; Continental Airlines, Inc. ("Continental") which leased the Subject Aircraft from PHC during the same time and was responsible for its maintenance, repair, airworthiness; MK Aviation USA, Inc. ("MK Aviation") which purchased the Subject Aircraft, on January 5, 2005; and, MK Leasing USA ("MK Leasing") which leased the Subject Aircraft to West Carribean in July 2005. (3d Am. Compl. ¶¶ 11–24, 48 & 52.) All of the U.S. Defendants, save for MK Aviation and MK Leasing, remain in the Crew Member Case.

[7] These lawsuits were also consolidated into a single case, *i.e.*, the instant case, *In re West Carribean Crew Members*, Case No. 07-22015-Civ-Ungaro. (D.E. 23.)

2007: *Forum Non Conveniens* Litigation in the Passenger Case

In March of 2007, the Carrier Defendants moved for a *forum non conveniens* dismissal of the Passenger Case in favor of the French court in Martinique. (06-22748, D.E. 54.) The Passenger Plaintiffs opposed the Motions arguing primarily that: the Montreal Convention preempted the *forum non conveniens* analysis and that the public and private interest factors weighed in favor of this forum because the Carrier Defendants would likely pursue third-party, product-liability contribution claims against the U.S. Defendants. (06-22748, D.E. 170.) Importantly, in their opposition, the Passenger Plaintiffs, including the Bapte Plaintiffs, acknowledged the pending product-liability claims in the Crew Member Case, but represented they did not intend to pursue their own product-liability claims in this Court.[8] (06-22748, D.E. 170, pp. 10 – 12.) Instead, before the Court ruled on the *forum non conveniens* motions, the Bapte Plaintiffs initiated product-liability lawsuits in Martinique against several U.S. Defendants, including Boeing, Pratt & Whitney, United Technologies, and Newvac, which remain pending.[9] (06-22748, D.E. 170,

[8] Further, neither the Bapte Plaintiffs, nor any other Passenger Plaintiffs, argued that 28 U.S.C. § 1369 required that all litigation involving the subject accident be resolved in this forum, which the Bapte Plaintiff now belatedly argue in their Motion to Intervene.

[9] Sometime prior to August 2009, the Bapte Plaintiffs moved the French court in Martinique to decline to exercise jurisdiction over their pending claims, including the Montreal Convention claims, but the French court rejected this

p. 10; D.E. 342, p. 8, 359-1 & 366.) Thus, importantly when the Court had the *forum non conveniens* motion in the Passenger Case under consideration, the Bapte Plaintiffs had not asserted any product-liability claims in this Court, represented that they had no intention of doing so, and, in fact, had initiated product-liability claims in Martinique. (06-22748, D.E. 170, pp. 10 – 12.)

On November 13, 2007, this Court granted the motions finding that all of the relevant factors weighed in favor of *forum non conveniens* dismissal. (06-22748, D.E. 184) (granting *forum non* dismissal); *In re West Carribean Airways, S.A.*, 619 F. Supp. 2d 1299 (S.D. Fla. 2007) (holding the doctrine of *forum non conveniens* applies to actions under the Montreal Convention); *see generally Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). First, Martinique was an adequate and available alternative forum because the Carrier Defendants conceded liability, waived jurisdictional objections, waived statute of limitations objections, and waived damage caps under the Montreal Convention in the French court. (06-22748, D.E. 184, pp. 6 – 8.) Second, the private interest factors favored Martinique because all of the Passengers were residents of Martinique and none were United States citizens or residents and, given that only damages would be at issue in the French court, the relevant evidence was more readily available in Martinique.[10] (06-22748, D.E. 184, pp.

maneuver, on or around August 31, 2009. (D.E. 366, pp. 13–19.)

[10] Critically, because the Passenger Plaintiffs stated they had no intention of bringing product-liability claims in this Court, the availability of product-liability evidence in

8–12.) Third, the public interest factors favored Martinique because of Martinique's superior interest in redressing the injuries to its residents. (06-22748, D.E. 184, pp. 12–14.) Finally, there was no question the Passenger Plaintiffs would be able to prosecute their suits in Martinique because the Passengers were from Martinique and the Carrier Defendants stipulated to the jurisdiction of the French court and otherwise to the Passenger Plaintiffs' ability to reinstate their claims. (06-22748, D.E. 184, pp. 14–15.) The United States Court of Appeals for the Eleventh Circuit affirmed the dismissal on October 8, 2009.[11] *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009).

The Bapte Plaintiffs made no effort to intervene in the Crew Member Case or otherwise assert claims in the U.S. By all accounts, the Passenger Case has successfully proceeded in Martinique. In those proceedings, as stipulated, the Carrier Defendants, including Newvac and West Caribean have conceded liability and waived the Montreal Convention damages caps, leaving only the calculation of damages at issue. (D.E. 368, pp. 12–36.) Numerous Passenger Plaintiffs already have been awarded damages. (D.E. 374.)

Martinique was not a significant factor. (06-22748, D.E. 184, pp. 8–12.)

[11] The Bapte Plaintiffs have apparently petitioned the Court of Appeals for review *en banc*.

2008: *Forum Non Conveniens* Litigation in the Crew Member Case

On January 25, 2008, several months after the *forum non conveniens* dismissal in the Passenger Case, the U.S. Defendants moved to dismiss or transfer the Crew Member Case to the French court in Martinique. (D.E. 76 – 80.) The Crew Member Plaintiffs opposed the Motion, primarily arguing that the French court in Martinique was not an available forum for a product-liability litigation between Colombian nationals or residents and the U.S. Defendants. (D.E. 155.) On September 30, 2008, this Court denied the motions seeking a *forum non conveniens* dismissal or transfer to Martinique; the undersigned was unable to find that the French court in Martinique, a European Union court, was an available alternative forum because the Crew Members, unlike the Passengers, were not French nationals or residents of Martinique and no other sufficient connection to Martinique was present in this case.[12] (D.E. 224.) The Bapte Plaintiffs made no effort, at that time, to intervene in the Crew Member Case.

Thereafter, on October 16, 2008, the U.S. Defendants moved to dismiss or transfer the Crew Member Case to Colombia.[13] (D.E. 244 – 252.) On May

[12] The resolution of this issue required the analysis of expert testimony and other evidence regarding the state and interrelationship of French and European Union law. (D.E. 224.)

[13] To be sure, the issue of Colombia as an alternative forum was previously raised in June 2008 by several U.S. Defendants. (D.E. 178.)

14, 2009, the Court denied the motions seeking dismissal or transfer to Colombia. (D.E. 321.) Although the undersigned concluded that the Colombian courts were available fora, the remaining factors did not weigh in favor of *forum non conveniens* dismissal to Colombia. *See generally Piper Aircraft Co.*, 454 U.S. 235. The undersigned concluded that the private and public interest factors, unlike in the Passenger case, weighed in favor of this forum, particularly given the presence of virtually all liability evidence in the U.S. and the relatively few foreign plaintiffs involved.[14] (D.E. 321.)

2009: the Bapte Plaintiffs Move to Intervene in the Crew Member Case

After years of procedural litigation regarding the proper forum and other similar matters, the Crew Member Case is in discovery and set for trial within the year. (D.E. 363.) However, on August 13, 2009—four years after the crash, two and a half years after filing their Montreal Convention Claim, two years after the filing of the Crew Member Case, two years after the transfer of the Passenger Case to Martinique, at least two years since the initiation of their product liability claims against the U.S. Defendants in Martinique, one year after the denial of the first *forum non conveniens* order in the Crew Member Case, and months after the denial of the second—and despite

[14] Contrastingly, in the Passenger Case dismissed a year earlier, liability was not at issue and hundreds of foreign plaintiffs were involved.

their actions and representations throughout the previous years of litigation, the Bapte Plaintiffs filed the pending Motion to Intervene. All of the existing parties to the Crew Member Case oppose the intervention.

Discussion

The Bapte Plaintiffs move to intervene as of right pursuant to Federal Rule of Civil Procedure ("Rule") 24(a)(1) and 28 U.S.C. § 1369(d) and to join the Crew Member Case as Plaintiffs against U.S. Defendants Boeing, Pratt Engine, United Technologies, and Newvac, but not against the remaining U.S. Defendants. (D.E. 342.) The Bapte Plaintiffs argue that § 1369(d) provides them an unconditional and independent right to intervene and, in the alternative, that they are entitled to intervene pursuant to Rule 24(a)(1). However, § 1369(d) does not create a right to intervene outside of Rule 24, and the Bapte Plaintiffs' Motion to Intervene does not satisfy the requirements of Rule 24(a)(1).

I

The Bapte Plaintiffs argue that they may intervene without satisfying the requirements of Rule 24 because "intervention under § 1369(d) is mandatory given the legislative intent." (D.E. 342, p. 14.) The Court does not agree that the language of the statute entitles the Bapte Plaintiffs to ignore the requirements of Rule 24, and the Bapte Plaintiffs do not cite nor has this Court discovered a single case of record holding otherwise.

The Multiparty, Multiforum Jurisdiction Trial Jurisdiction Act of 2002, 28 U.S.C. § 1369, expanded the subject matter jurisdiction of the United States district courts to include litigation involving certain catastrophic accidents. Section 1369(a) states:

> **In general.**—The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location, if—
>
> > **(1)** a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;
> >
> > **(2)** any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or
> >
> > **(3)** substantial parts of the accident took place in different States.

Section 1369(d) concerns intervention and states:

> **Intervening parties.**—In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection

> (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.

The Bapte Plaintiffs argue that the inclusion of the word "shall" requires that this Court interpret subsection (d) as creating a mechanism for intervention independent of Rule 24.

However, the undersigned does not agree that § 1369(d) supersedes Rule 24. Although "a statute passed after the effective date of a federal rule repeals the rule to the extent that it actually conflicts," *Mitchell v. Farcass*, 112 F.3d 1483, 89 (11th Cir. 1997), "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest," *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (quotations omitted). "We will not infer a statutory repeal "unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Id.* (quotations omitted). It is "a cardinal principle of statutory construction that repeals by implication are not favored." *U.S. v. Aguilar*, 515 U.S. 593, 616 (1995). Here, an intention to repeal Rule 24 is not clear and manifest.

First, § 1369(d) does not explicitly mention or reference Rule 24. Consistent with the well established principles of statutory interpretation, Congress is presumed to be aware of the relevant legal context when drafting legislation. *See Lane v. Pena*, 518 U.S. 187, 202 (1996); *Canon v. Univ.*

of Chicago, 441 U.S. 677, 696 – 97 (1946). And the relevant legal context with respect to intervention in the federal courts is that: "Intervention in a federal court is governed by Fed. Rule Civ. P. 24." *N.A.A.C.P. v. New York*, 413 U.S. 345, 365 (1973); *Georgia v. Ashcroft*, 539 U.S. 461, 476 (2003). In fact, the Bapte Plaintiffs have not cited and this Court is not aware of any other statute providing for intervention in a civil case outside of Rule 24. Accordingly, an explicit and unambiguous repeal of Rule 24 would be expected if that were Congress's intent.

Second, § 1369(d) is easily read in harmony with Rule 24 which clearly contemplates the existence of "unconditional right[s] to intervene" by federal statute. Rule 24(a) states:

> **Intervention as of Right.** On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by federal statute; or . . . Indeed, other strongly worded statutes, have been applied by way of Rule 24(a)(1). *See, e.g.*, *Ruiz v. Estelle*, 161 F.3d 814, 816–21 (5th Cir. 1998) (applying statute which stated local and state officials "shall have the right to intervene in any preceding relating" to certain claims under the Prison Litigation Reform Act by way of Rule 24(a)(1)). The Bapte Plaintiffs argue the inclusion of the word "shall," as opposed to "may," in the phrase "shall be permitted" requires that § 1369(d) be read to conflict with Rule 24. However, the Court disagrees; the phrase "shall be permitted" is no

more forceful than "shall have the right" the latter of which has been held to operate only by way of Rule 24(a)(1). *See id.* The stronger language simply serves to create an "*unconditional*" right to intervene as required by Rule 24, which otherwise would not automatically be the case. *See* C. Wright, A. Miller, & M. Kane, 7C Fed. Prac.& Proc. Civ. § 1906 (3d ed. 2009) ("[T]he courts have been hesitant to find an unconditional statutory right of intervention."). Thus, § 1369(d) does not create a separate, independent right to intervene, and the Bapte Plaintiffs Motion to Intervene must satisfy the requirements of Rule 24.

II

The Bapte Plaintiffs' Motion to Intervene does not satisfy the requirements of Rule 24 because it is untimely. A motion to intervene pursuant to Rule 24(a)(1) must be timely.[15] "Timeliness is to be

[15]

> Whether intervention is claimed as of right or as permissive, it is at once apparent from the initial words of both Rule 24(a) and Rule 24(b), that the application must be "timely." If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness.

N.A.A.C.P. v. New York, 413 U.S. at 365. The timeliness analysis is identical under both Rule 24(a) and Rule 24(b). *See id.* at 348 n. 3; *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977) ("Whenever leave to intervene is sought under section (a) or section (b) of Rule 24, the application must be timely."). Although some courts have artic-

determined from all the circumstances[, a]nd it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *N.A.A.C.P. v. New York*, 413 U.S. at 365–66 (citations omitted); *see also Stallworth*, 558 F.2d at 263 ("[T]imeliness is not limited to chronological considerations but is to be determined from all the circumstances.") (citations omitted). The factors courts consider in evaluating timeliness include:

> (1) the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if his petition is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

United States v. Jefferson County, 720 F.2d 1511, 1516 (11th Cir. 1983); *accord N.A.A.C.P. v. New York*, 413 U.S. at 366. Application of the factors to

ulated a separate rule that a "district court should apply a more lenient standard of timeliness if the would-be intervenor qualifies for intervention under section (a) than if he qualifies for intervention under (b)," this concept is incorporated into any timeliness analysis which considers prejudice to the would-be intervenor if the intervention is denied. *See id.* at 265–66.

this case demonstrates that the Motion to Intervene is untimely.

First, the Motion to Intervene is unseasonable because the Bapte Plaintiffs were aware of the Crew Member Case for at least two years prior. Second, because of this delay, allowing the intervention would require the litigation of complex procedural issues which would prolong the Crew Member Case and prejudice the existing parties. Third, and most importantly, the Bapte Plaintiffs will suffer absolutely no prejudice if the Motion to Intervene is denied because their interests are adequately protected in this Court and, in any event, they are currently able to pursue their remedies in Martinique. And fourth, the unusual circumstances of this case, including the currently pending cases in Martinique, strongly weigh against intervention.

A

The Bapte Plaintiffs' Motion to Intervene is unseasonable. The Bapte Plaintiffs knew of Crew Member Case two years ago as stated in their opposition to the *forum non conveniens* motion in the Passenger Case and obviously knew of their product-liability claims against several of the U.S. Defendants, including Boeing, Pratt & Whitney, United Technologies, and Newvac, since they initiated these very claims in the French court in Martinique. Nonetheless, the Bapte Plaintiffs argue their motion is timely because it "comes shortly after the Court's May 13, 2009 [Order denying dismissal for *forum non conveniens*] the effect of which was to significantly alter the land-

scape of the litigations arising out of the crash of WCA flight 708" and "prior to the same, the Court's rulings were that these Plaintiffs would have to seek remedy in France." (D.E. 342, p. 17.) This argument is unconvincing; the Bapte Plaintiffs asserted their product-liability claims in Martinique before this Court granted the *forum non conveniens* motions in the Passenger Case. Moreover, the landscape of the litigation was not altered by this Court's Order denying dismissal for *forum non conveniens* in the Crew Member Case.[16] This Court has always been the venue for the Crew Member Case; has never ruled that the Crew Member Plaintiffs must seek remedy in France; and, in fact, had previously denied a motion to dismiss for *forum non conveniens* in the Crew Member Case. Accordingly, the two-year delay weighs against intervention. *See, e.g., In re Bank of N.Y. Derivative Litig.*, 173 F. Supp. 2d 193, 201 (S.D.N.Y. 2001) (denying motion to intervene as untimely where motion was filed after suit had been pending for two years).

[16] The Court did not, as the Bapte Plaintiffs argue, in its May 2009 order denying *forum non conveniens* dismissal in the Crew Member Case "consider itself the most convenient forum to adjudicate the product liability and negligence claims of foreign plaintiffs." (D.E. 342) The Court decided only the issue before it, *i.e.*, that it was a more convenient forum for the claims of the Crew Member Plaintiffs than was Colombia. (D.E. 321)

B

Granting the Motion to Intervene will prejudice the existing parties.[17] "The inquiry for this factor is whether other parties were prejudiced by the *delay*, not whether they would be prejudiced by *the addition of the claim*." *Effjohn Int'l Cruise Holdings, Inc. v. A & L Sales, Inc.*, 346 F.3d 552, 561 (5th Cir. 2003) (emphasis in original). Because of the two-year delay, allowing intervention will now result in complex and consuming procedural litigation which will significantly prolong the Crew Member Case and thereby prejudice the existing parties. *See, e.g.*, *MasterCard Int'l Inc. v. Visa Intern Serv. Int'l Inc.*, 471 F.3d 377, 390 (2d Cir. 2006) (holding postponed resolution would prejudice existing parties); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994) ("Intervention is a procedural device that attempts to accommodate two competing policies: efficiently administering legal disputes by resolving all related issues in one lawsuit, on the one hand, and keeping a single lawsuit from becoming unnecessarily complex, unwieldy or prolonged, on the other hand.") (citing *U.S. v. Tex. E. Transmission Corp.*, 923 F.2d 410, 412 (5th Cir. 1991)); *Hollywood Cmty. Synagogue, Inc.*, 254 Fed. Appx. 769, 771 (11th Cir. 2007) (affirming denial of intervention as untimely where existing parties would be prejudiced by "practically undoing twenty-two months of litigation").

[17] Importantly, even without prejudice to the existing parties, the Court would, in its discretion, deny the Motion to Intervene as untimely based upon the remaining three factors.

First, during the delay, the existing parties extensively litigated the issue of *forum non conveniens*, and to allow the intervention now would almost certainly require re-litigation of the issue. As explained above, transfer of the Crew Member Case to Martinique was previously denied because the French court's jurisdiction in the absence of any significant connection to Martinique was doubtful. However, the analysis would be different if the Bapte Plaintiffs intervened because the Passengers, unlike the Crew Members, were French citizens or residents of Martinique. Re-litigating this issue would prejudice the existing parties with further and significant procedural delay, regardless of the outcome. And if the Crew Member Case was ultimately transferred to Martinique, the existing parties would suffer even greater prejudice in the form of further delay and wasted costs and efforts in this Court.[18] *See, e.g.*, *MasterCard*, 471 F.3d at 390.

Second, during the delay, Florida's limitations period lapsed, and to allow the intervention now will require litigation regarding the impact of this lapse on the Bapte Plaintiffs' claims. Florida

[18] The Bapte Plaintiffs have not cited nor has the Court discovered any case which supports the contention that a *forum non conveniens* analysis would be foreclosed if intervention was allowed. As the Crew Member Plaintiffs point out in their opposition, actions removed to federal court from state court pursuant to § 1369, for instance, are clearly subject to *forum non conveniens* analysis. *See* 28 U.S.C. § 1441(e)(5) & (6). And in their oppositions, several of the U.S. Defendants indicate they will pursue dismissal for *forum non conveniens* if the Bapte Plaintiffs intervene. (D.E. 352, p.9.)

imposes a two-year statute of limitations for wrongful death actions. *See* Fla. Stat. § 95.11(4)(d); *Saxton v. ACF Indus., Inc.*, 254 F.3d 959, 961 (11th Cir. 2001) (holding a federal district court sitting in diversity applies the statute of limitations rules of the forum state). Thus, whether Florida's statute of limitations applies and whether the Bapte Plaintiffs' Complaint in Intervention relates back would be critical and contentious issues.[19] Again, regardless of the outcome, litigation of this issue would prejudice the existing parties with further and significant procedural delay. *See, e.g.*, *MasterCard*, 471 F.3d at 390.

Third, during the delay, the existing parties agreed that foreign (non-U.S.) law did not apply to the Crew Member Case, and allowing the intervention likely would reopen this issue.[20] Litigation

[19] In their Reply, the Bapte Plaintiffs argue that their Complaint in Intervention would relate back, obviating any statute of limitations issues. (D.E. 375.) This is not clearly the case; the application of the doctrine of relation-back to complaints in intervention under Rule 24 is far from settled among the federal courts. *See generally, e.g.*, *Cachil Dehe Band of Wintun Indians of Colusa Indian Comty. v. California*, 929 F. Supp. 2d 1091, 1102 – 05 (E.D. Cal. 2009). And as explained above, the point as far as the instant analysis is concerned is the prejudice which will be caused by the litigation of this issue itself—which, but for the Bapte Plaintiffs' two-year delay, would not otherwise be necessary. And the same is true of the Bapte Plaintiffs' equitable tolling arguments.

[20] On May 15, 2009, the Court ordered any existing party intending to rely on foreign law to comply with Fed. R. Civ. P. 44.1 within 60 days; no party indicated an intent to rely on foreign law. (D.E. 324) The Bapte Plaintiffs assert

of choice of law issues is usually a complex exercise,[21] and, in this case, the outcome of the choice of law litigation would be critical to the resolution of the Bapte Plaintiffs' claims. Among other issues, choice of law will affect the measure of damages, the applicable statute of limitations, and standing to bring wrongful death actions.[22] Thus, the issue of the application of foreign law would

they will agree to be bound by all prior orders of the Court in an effort to alleviate prejudice to the existing parties. (D.E. 375, p.3.) Convenient as it may be for the Bapte Plaintiffs to join this litigation *as is* now that it has taken a turn they deem favorable, the Court is not convinced the existing parties, in particular the U.S. Defendants, would not seek to re-open these issues. Indeed, the U.S. Defendants would likely argue that French law should govern the Bapte Plaintiffs' damages claims if intervention were allowed.

[21] "In determining which law applies, a federal district court sitting in diversity must apply the choice of law rules of the forum state." *Rando v. Gov't Empl. Ins. Co.*, 556 F.3d 1173, 1176 (11th Cir. 2009). With respect to tort claims, Florida applies the most significant relationships test in analyzing choice-of-law issues, *see, e.g., Proprietors Ins. Co. v. Valsecchi*, 435 So.2d 290, 294 (Fla. 3d DCA 1983), and, under Florida law, different issues might be governed by different substantive law; for instance, the issues of liability and damages might be governed by the laws of different jurisdictions. *See Foster v. U.S.*, 768 F.2d 1278, 1281 (11th Cir. 1985); *Stallworth v. Hospitality Rentals, Inc.*, 515 So. 2d 413, 415 (Fla. 1st DCA 1987).

[22] Under Fla. Stat. § 95.10 and the Florida Supreme Court's decision in *Merkle v. Robinson*, 737 So. 2d 540 (Fla. 1999), if a foreign jurisdiction is found to have the most significant relationship to a litigation then that foreign jurisdictions' statute of limitation applies. Florida's Wrongful Death Act creates a cause of action only for certain "survivors" of a decedent. *See* Fla. Stat. § 768.16 *et seq.*

almost certainly be revisited with respect to the Bapte Plaintiffs, and the existing parties would be prejudiced, not only because of the consequent delay, but also because the belated injection of foreign-law issues would require the existing parties to revisit their current trial and discovery strategies in which they have invested significant time and effort.

C

Denying the Motion to Intervene will not prejudice the Bapte Plaintiffs. The Bapte Plaintiffs argue that a judgment relieving the U.S. Defendants from product-liability in this case would prohibit the Bapte Plaintiffs from enforcing, in the United States, a separate judgment from Martinique holding the U.S. Defendants liable. (D.E. 342, p. 2.) However, this argument, even if legally sound, does not support the conclusion that the Bapte Plaintiffs will be prejudiced without intervention:

> The thrust of the inquiry must be the extent to which a final judgment in the case may bind the movant even though he is not adequately represented by an existing party. We note that this third factor thus has weight only in the situation where (a) the judge cannot anticipate the extent to which the a final judgment will bind a movant, or (b) the judge finds that although the movant has an identical interest with a party, he has sufficiently greater stakes than the party that the party's representation may be inadequate

> to protect the movant's interest. Otherwise, where the movant has no identity of interest with a party and thus could not be bound, or where his interest is identical with a party and consequently he is adequately represented, we would find no prejudice sufficient to give weight to the third factor.

Jefferson County, 720 F.2d at 1517.

First and foremost, the Bapte Plaintiffs' interest in establishing the liability of the U.S. Defendants is adequately protected in this Court by the Crew Member Plaintiffs and their experienced counsel. The Bapte Plaintiffs do not have a significantly greater stake than the Crew Member Plaintiffs in establishing the liability of the U.S. Defendants, and a liability judgment against the U.S. Defendants is no less likely without intervention. *Jefferson County*, 720 F.2d at 1517. Accordingly, regardless of their stated interest in a liability judgment against the U.S. Defendants in this Court, the Bapte Plaintiffs will not be prejudiced if intervention is denied.

Second and alternatively, a judgment relieving the U.S. Defendants from liability in this case would not materially impact the Bapte Plaintiffs, in any event. Currently, the Bapte Plaintiffs are poised to collect one hundred percent of their damages under the Montreal Convention in Martinique.[21] Notably, the Bapte Plaintiffs have not

[21] As explained above, in Martinique, the Carrier Defendants have waived damage caps and are not contesting liability under the Montreal Convention, and the Passenger Plaintiffs need proceed only on the issue of damages.

argued, and the Court fails to perceive how, they would be entitled to a double-recovery—once in Martinique under the Montreal Convention and a second time under product-liability theories either in Martinique or in this case.[24] Thus, even assuming a judgment relieving the U.S. Defendants from liability in this case would somehow prohibit the Bapte Plaintiffs from enforcing a liability judgment from Martinique, the effect would be of little significance. *Cf. Fox*, 579 F.3d at 1304 (denying motion to intervene as of right and noting that potential effect of adverse ruling was insufficient to necessitate intervention) (citing *ManaSota-88 v. Tidwell*, 896 F.2d 1318, 1323 (11th Cir. 1990) ("[A] potential stare decisis effect does not automatically supply the practical disadvantage warranting intervention.")); *Campbell v. Hall Mark Elec. Corp.*, 808 F.2d 775, 779 (11th Cir. 1987) (noting prejudice to potential intervenor was minimal where damages were available with or without intervention). Thus, denying the Motion to Intervene will not prejudice the Bapte Plaintiffs.

[24] This is likely why, of all the Passenger Plaintiffs, only the Bapte Plaintiffs are pursuing intervention in this Case. In their Reply, the Bapte Plaintiffs argue they may get greater damages under U.S. law (D.E. 375), but do not argue why French law would not govern their damages even if they intervened in the Crew Member Case. *See, e.g., Foster v. U.S.*, 768 F.2d 1278, 1281 (11th Cir. 1985) ("[D]ifferent substantive issues in a single case may have to be resolved under the laws of different states where the choices influencing the decisions differ."), *Stallworth v. Hospitality Rentals, Inc.*, 515 So. 2d 413, 415 (Fla. 1st DCA 1987) (same).

D

The unusual circumstances of this case weigh against intervention. "[I]ntervention may be sought in a wide variety of situations involving unique facts and procedural postures." *Tex. E. Transmission Corp.*, 923 F.2d at 412. "Because Rule 24 attempts to address all of these situations, the facts and procedural posture of each case are important, and it is often true that 'general rules and past decisions cannot provide uniformly dependable guidelines.'" *Id.* (citations omitted). Here, several unusual circumstances weigh against intervention.

First and foremost, the Motion to Intervene strongly hints of forum shopping; in fact, the Bapte Plaintiffs explicitly argue in their Reply that they are now seeking damages under U.S. law as opposed to the one-hundred percent of damages under French law being offered to them in Martinique and notwithstanding that they have product-liability claims that have been pending in the French court for over two years. (D.E. 375.) But the Court is not convinced this is a valid purpose for seeking what is essentially a transfer of venue from Martinique.[25] *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981) (holding, in the context of an airline-crash litigation, that conclusive and substantial weight should not be given to whether one forum's substantive law is more favorable to another's in the *forum non conveniens*

[25] Moreover, if the Bapte Plaintiffs' were so concerned about the application of U.S. law, they ought to have filed their product-liability claims in this jurisdiction three years ago.

analysis). "In such circumstances, a plausible likelihood exists that the selection was made for forum-shopping reasons, such as the perception that United States courts award higher damages than are common in other countries." *Iragorri v. United Tech. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001) (discussing *forum non conveniens* analysis where a foreign plaintiff chooses a U.S. forum) (quoting *Piper Aircraft*, 454 U.S. at 256). Additionally, rather than reducing the risk of inconsistent judgments, intervention would raise international comity concerns because the French court in Martinique has already rejected the Bapte Plaintiffs' attempt to transfer to this Court the claims against several of the U.S. Defendants pending in Martinique, and whether the French court would continue to exercise concurrent jurisdiction over those claims is unclear. *See generally, e.g.*, *Belize Telecom, Ltd. v. Gov't of Belize*, 528 F.3d 1298, 1305 (11th Cir. 2008) (describing the circumstances when federal courts should abstain from the exercise of jurisdiction of private international disputes under the principal of international comity).[26]

Second, the Motion to Intervene is essentially an attack on this Court's previous *forum non conveniens* rulings.[27] Nothing prevented the Bapte

[26] Similarly, the Bapte Plaintiffs' arguments regarding the purpose of § 1369(d) is unavailing because a second litigation arising from the crash will exist in Martinique under the Montreal Convention regardless of the intervention.

[27] This is consistent with the Bapte Plaintiffs' choice to file the Motion to Intervene concurrently with their Motion for Rule 60(b) Relief in the Passenger Case—two years late.

Plaintiffs from asserting product-liability claims against the U.S. Defendants in the Passenger Case, the existence of which would have been considered in the Passenger Case *forum non conveniens* analysis. And similarly, nothing prevented the Bapte Plaintiffs from moving to intervene prior to the extensive *forum non conveniens* litigation in this case. Instead, the Bapte Plaintiffs' now argue that they are effectively entitled both to a do-over of their *forum non conveniens* litigation in the Passenger Case and to circumvent the *forum non conveniens* litigation in the Crew Member Case by way of a late-in-the-game intervention. However, the Bapte Plaintiffs are not so entitled.

> A party's strategic decisions for litigation are, to a great extent, based on conjectures about what future course will be most favorable to the party; with hindsight, some of the conjectures turn out to be incorrect. But to hold litigants to their strategic decisions on how broadly or narrowly they wish to litigate is not unfair.

Shahar v. Bowers, 120 F.3d 211, 213 (11th Cir. 1997).

Third, intervention would put an undue burden on the existing parties, the Court, and the citizens comprising the jury.[28] *See Fox v. Tyson Foods, Inc.*, 579 F.3d 1298, 1304 (11th Cir. 2008) (noting that defendant "would need at least an additional year

[28] There are roughly 900 Passenger Plaintiffs, and the Bapte Plaintiffs comprise several hundred of them. (D.E. 344-1, Ex. 1.)

to depose the 161 petitioners" in affirming denial of permissive intervention); *Cf. Piper Aircraft*, 454 U.S. at 243–44, (upholding dismissal for *forum non conveniens* where "it would be unfair to burden the citizens with jury duty when the Middle District of Pennsylvania has little connection with the controversy").

Finally, after years of litigation in both the Passenger and Crew Member Cases, the Bapte Plaintiffs' recent attempts at reversing the course of their litigation are highly irregular, when viewed from the ground-level and in the totality of the circumstances. While the Bapte Plaintiffs themselves sit, uncompensated for their losses despite the damage awards *awaiting* them in Martinique, counsel for the Bapte Plaintiffs seem intent on engaging in last-minute procedural maneuvering with no clear relation to their clients' interests.

Conclusion

In sum, the Bapte Plaintiffs now seek to undo strategic decisions they made years ago. Their motives are highly questionable, and none of the relevant factors weighs in favor of intervention. Indeed, the Bapte Plaintiffs have not cited and the Court has not discovered a single case of record supporting intervention under similar circumstances. Thus, the Court, in its discretion, denies the Motion to Intervene as untimely.

Accordingly, it is

ORDERED AND ADJUDGED that the Motion to Intervene (D.E. 342) is DENIED. It is further

ORDERED AND ADJUDGED that the Motion for Oral argument (D.E. 345) is DENIED AS MOOT. It is further

ORDERED AND ADJUDGED that the Motion for Clarification (D.E. 395) is DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 8th day of January, 2010.

/s/ URSULA UNGARO
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 07-22015-CIV-UNGARO
Consolidated Cases

IN RE: WEST CARIBBEAN AIRWAYS
CREW MEMBERS

ORDER OF DISMISSAL

THIS CAUSE is before the Court *sua sponte*.

THE COURT has reviewed the record and is otherwise fully advised in the premises. On June 3, 2010, this Court entered its Notice of Court Practice upon Notice of Settlement, which stated:

> THE PARTIES are hereby notified that all papers related to the settlement reached between the parties, including any order of dismissal stating specific terms and conditions, must be received by this Court by June 18, 2010. If such papers are not filed by this deadline, the pending claims between the parties will be dismissed without further notice.

(D.E. 458.) As of June 18, 2010, no settlement papers were filed. Accordingly, it is

ORDERED AND ADJUDGED that this Case is DISMISSED. It is further

ORDERED AND ADJUDGED that the Status Conference set for June 23, 2010 is CANCELLED.

DONE AND ORDERED in Chambers at Miami, Florida, this 21st day of June, 2010.

/s/ URSULA UNGARO
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 07-22015-UNGARO

IN RE: WEST CARIBBEAN AIRWAYS
CREW MEMBERS

JOINT NOTICE OF SETTLEMENT

Plaintiffs and Defendants hereby advise the Court that they have settled the case, and are currently preparing all paperwork needed to conclude the settlement. A Stipulation for Dismissal with prejudice will follow.

Based on this settlement, the Parties request that the Court administratively close the case, but reserve jurisdiction to address the lien filed by Motley Rice, and to effectuate or enforce the settlement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 1, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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Fed. R. Civ. P. 60—Relief from a Judgment or Order

* * *

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing.

A motion under Rule 60(b) must be made within a reasonable time—and for reasons

(1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality.

The motion does not affect the judgment's finality or suspend its operation.

* * *

28 U.S.C. § 1407 Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

* * *